Basantilal and Another Vs. Ramashankar and Others

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Court : Mumbai Nagpur

Decided On : Feb-06-2014

Judge : A.P. Bhangale

Appeal No. : Second Appeal Nos. 164 of 2002 & 198 of 2002

Appellant : Basantilal and Another

Respondent : Ramashankar and Others

Judgement :

1. Second Appeal No.164 of 2002 is filed by Basantilal Motilal Tiwari and Second Appeal No.198 of 2002 filed by Ramashankar Kantaprasad Tiwari are directed against Judgment and order dated 10-12-2001 passed by 3rd Additional District Judge, Nagpur in Regular Civil Appeal No.283 of 2000 which was partly allowed allowing one-third share to the Ramashankar (Original Plaintiff) and one-third share each to Basantilal (Ori. Defendant No.1) and Umashankar (Ori. Defendant No.2). Both the appeals arose out of the Judgment and order dated 14-01-2000 passed by the 5th Joint Civil Judge Senior Division at Nagpur in Special Civil Suit No.692 of 1988 whereby the suit was dismissed by the trial Court.

2. Second Appeal No 164 of 2002 was admitted by this Court on 2nd May 2005 on the following substantial Questions of law:-

i) Whether the suit was not tenable and was liable to be dismissed for misjoinder of causes of action?

ii) Whether the First Appellate Court was justified in declaring the shares of the parties in the absence of any prayer to that effect by the plaintiff?

My answers for (i) Suit was tenable and ought to have resulted in conditional preliminary decree as under (ii) is affirmative to avoid multiplicity of the judicial proceedings in the larger interest of justice.

3. Second Appeal No.198 of 2002 was admitted by this Court upon following substantial questions of law:-

i) Whether the Lower Appellate Court was right in assuming that the suit plot was vested in the Government in the absence of any pleadings?

Answer:- The First appellate Court was justified to reach and record finding as to title of the suit property as last court of facts.

ii) Whether the agreement (Ex 108) amounts to transfer and is hit by Nagpur Improvement Trust Land disposal Rules 1983?

Answer:- So far as the right to possess the construction made upon the leasehold land with the Sanction of the NIT, the agreement entered in to between the private parties as co-sharers would bind them to effect the transfer of right to possession of the construction made upon the leasehold land as between the parties to the agreement and/or the suit. Upon such agreement the private parties must inform the NIT and other competent local Authority to save the agreement from being hit by law or from being invalidated under the NIT Land disposal Rules, 1983.

iii) Whether the first appellate court failed to follow the procedure in Order 41 rule 2 of the Code of Civil Procedure?

Answer:- No. The First appellate court, in the larger interest of justice as final court of facts, can decide the first appeal without being confined to the grounds set out in the memorandum of the appeal by the appellant.

4. Substantial questions of law are answered accordingly for the following reasons.

5. Briefly stated facts are:

Subject matter of the dispute is leasehold interest in Plot No. 280 having total area of 9828.22 Sq. Feet owned and disposable by the Nagpur Improvement Trust. The plot has construction of 4905.80 Sq. Feet sanctioned by the Nagpur Improvement Trust (NIT) out of total buildable area of 8914.11 Sq. feet. The leasehold interest in the suit plot was not capable of sub-division under the rules of NIT. Basantlal Motilal Tiwari, (the first defendant) had constructed residential Block with a staircase on the North side while the plaintiff was allotted the western portion which he had constructed to the west of AB line shown in the Map. Remaining portion was allotted to Basantlal Motilal Tiwari.

Family Genealogical tree is as under:-

(Kantaprasad) = Chandrakalabai (Deft no. 4)

Died on 30-10-1981

|________________________________|

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Ramashankar Umashankar Sushilkumar

(Plaintiff) (Def.No.2) (Def.No.3)

Basantlal Motilal Tiwari (first defendant) is nephew of Kantaprasad and used to look after familys business along with Kantaprasad.

The parties are referred to by their nomenclature as stated in the title to the suit in trial Court.

The plaintiff in the suit filed in the trial Court had claimed two-third share in the suit plot no.280 with construction thereon. According to the Plaintiff there was partition of the suit property under the agreement dated 15-07-1982. The plaintiff also prayed for an injunction to restrain Tenants of the shops in the suit plot from paying rent to Basantilal,(the first defendant), requiring the shopkeepers to deposit it in the Court. It is case of the Plaintiff that his Father Kantaprasad died on 30-10-1981. On the first death anniversary of Kantaprasad, there was Partition on 30-10-

1982 between Ramashankar and defendant nos.2, 3, 4. List of shares prepared was signed. Accordingly the Partition was effected in writing dated 28-05-1983 on a Stamp Paper of the denomination of Rs. 5/-. According to the Plaintiff, Basantilal Motilal Tiwari (first defendant) is nephew of Kantaprasad resided by the side of the suit plot .Umashankar (2nd defendant) had released his share in the suit plot in favour of the Plaintiff by an affidavit while the plaintiff had released his share in the joint family property by an affidavit. List of Partition was prepared on 28-05-1983 and acted upon by the parties, taking actual possession of their shares accordingly. The Plaintiff had entered in to an agreement with the Basantlal (first Defendant) and Umashankar (Second defendant) on 15-07-1982. The Plaintiff and the first defendant had agreed to share the suit plot and pay the dues of the ground Rent to NIT by getting their names mutated in the record of the NIT. On 4-7-1958 the plaintiff and the defendant no.1 and 2 applied to NIT for the transfer of the leasehold interest in the suit plot. Deletion of the name of Umashankar, second defendant was sought. On 11-06-1972 Basantlal moved an application to the Nagpur Municipal Corporation (NMC) and informed by an affidavit dated 5-06-1974 that it was he who had constructed the building on the half portion of the land. NIT by Memo dated 05-09-1989 issued to the plaintiff and first and second defendant demanded sum of Rs 683/- which was deposited by the plaintiff on 21-09-1989. The plaintiff had on 30-09-1989, also applied to NIT for renewal of the leasehold interest with effect from 01-04-1989 for the term of 30 years. The first defendant had resisted the suit claiming that entire ground rent, premium, municipal Taxes etc. payable were paid by him.

6. Learned Counsel Shri Manohar alleged that there was collusion between the first and second Defendants on the pretext of alleged relinquishment of his share by the second defendant in favour of the Plaintiff Ramashankar. Shri Manohar submitted that as against the first Defendant, no any evidence was led in respect of the contribution for the construction by the Plaintiff. Ramashankar had shared the contribution but had never paid the entire ground Rent. No any general suit was filed for the Partition. Share on Partition would be different than share in leasehold. Relinquishment of his share by Umashankar was for consideration as per Ex 91. With reference to the ruling in **Mahadeo Tulsiram Pathade through L.R.s Vs. Vatsalabai Shamrao Pathade** reported in **2008 (6) Mah L J 496** that in

a suit for Possession when Memorandum of the partition was relied upon in evidence which was a document in the nature of family arrangement or sort of compromise or settlement but which could not be construed as a Partition deed by which any right was created, extinguished or declared so as to render it as compulsorily registrable. It was held by this court as merely memo of Partition and it was not a deed required to be registered compulsorily. True it is that a family arrangement by which the property is equitably divided between the various contenders so as to achieve an equal distribution of wealth instead of concentrating the same in the hands of a few is undoubtedly forms a milestone in the administration of social justice. That is why the term 'family' has to be understood in a wider sense so as to include within its fold not only close relations or legal heirs but even those persons who may have some sort of antecedent title, a semblance of a claim or even if they have a spes successionis, so that future disputes are sealed for ever and the family instead of fighting claims inter se and wasting time, money and energy on such fruitless or futile litigation is able to devote its attention to more constructive work in the larger interest of the country. The Courts have, therefore, leaned in favour of upholding a family arrangement instead of disrupting the same on hyper technical or trivial grounds. Where the Courts find that the family arrangement suffers from a legal lacuna or a formal defect the rule of estoppel is pressed into service and is applied to shut out plea of the person who being a party to family arrangement seeks to unsettle a settled dispute and claims to revoke the family arrangement under which he has himself enjoyed some material benefits.

Shri Manohar also invited my attention to the view expressed by this Court in the case of **Nilkanth Sampat Khandade Vs. Bhaurao Sampat Khandade** reported in **2008 (4) Mah. L.J. 215**. In that case this court found that the Relinquishment of right in immovable property by deed for disclosed consideration of Rs.50.000/- by a deed attracted Sections 34, 37 of the Bombay Stamp Act read with Sections 17 and 49 of the Registration Act and hence objection as to admissibility was upheld and Relinquishment Deed was held inadmissible in evidence for reasons stated by this in the facts and circumstances of that case.

7. On behalf of the appellant Shri Ramashankar Advocate Shri Deshpande contended that finding by the first appellate court is wrong as the first appellate court went in to questions which were neither pleaded nor proved. Shri Deshpande contended that the fact as to who was paying the ground rent is material. According to Shri Deshpande in the absence of the evidence the suit was rightly dismissed. No reference has been made to the Land disposal Rules formulated by the NIT. According to him the decree could have been conditional subject to the approval by the NIT and NMC. He invited my attention to rulings as below:-

It is pointed out that this Court in earlier ruling in Ramdas Chimna Vs. Pralhad Deorao reported in 1964 Mah. L.J. 736 held that the relinquishment or abandonment of interest in the joint family property can be made orally. It would be valid and effective in law when proved. In other words if such relinquishment is executed by the written instrument for to relinquish the interest in the immovable property worth Rs. 100/- or more then surely it would be compulsorily registrable document attracting Section 17 of the Registration Act.

In **Munna Lal Vs. Suraj Bhan and others** reported in **AIR 1975 S.C. 1119** Three Judges Bench of Honble Supreme Court considered admissibility in evidence of the memorandum of the partition prepared as the memorandum of the past event but not registered. It is observed in Para 6 thus:-

œThe parties appear to have asked a person of common confidence to effect the partition and it was not intended to resort to any formal proceeding under the Arbitration Act. It was therefore not necessary for the parties to execute a formal reference or for the Punch to declare a formal written award. As a memorandum of a past event, the document could, therefore, be received in evidence though it is not registered.?

In the ruling of **Peddu Reddiar Vs Kothanda Reddy** reported in **AIR 1966 Mad 419 Madras High Court** answered question of law thus:-

œThe question of law, however, remains, whether the arrangement, by which items 1 to 4 of A schedule and one fourth share in the well in item 6 were allotted specifically to Ellappa, is valid in law. Ellappa and Peddu Reddi were co-owners.

An oral partition between co-owners is valid in law. Sec.9 of the Transfer of Property Act says that a transfer of property may be made without writing in every case in which writing is not expressly required by law. A partition between co-owners it may perhaps be said to involve a transfer of property because in the specific properties allotted to a particular co-owner the interest which the other co-owners had previous to the partition is given up and to that extent it may be said to be a transfer of property. But the Transfer of Property Act itself does not expressly require such a partition to be in writing, and there is no other provision of law requiring such a partition to be evidenced by writing.?

In **Roshan Singh Vs. Zile Singh** reported in **AIR 1988 SC 881** the Apex Court mentioned that it is well settled that the document though unregistered can be looked in to for the limited purpose of establishing severance in status, though that severance would ultimately affect the nature of possession held by the separated family as co-tenants.

In **K.K Modi Vs. K N Modi and others** reported in **(1998) 3 SCC 573** Apex Court laid down the principle that Memorandum of the understanding arrived at between two groups belonging to the same family regarding the Assets. Court should not lightly interfere with it especially when it has been substantially acted upon by the Parties. In **Bakhtawar Singh Vs. Gurudev Singh** reported in **(1996) 9 SCC 370** it was held that the memorandum of recording the past oral Partition of Joint Hindu Family as a family settlement is not required to be registered.

8. The evidence led indicated the undivided Hindu family existed which included Kamtaprasad and Motilal as Brothers at Gondia. Kamtaprasad came to Nagpur and acquired leasehold interest from the Nagpur Improvement Trust (NIT) in the suit land admeasuring 9828 Sq Feet for 30 years, lease tenure extendable by the lessor from time to time. Evidence of PW-1 Ramashankar revealed that first Defendant Basantlal s/o Motilal came as a student to Nagpur since the time he was studying in 7 th Standard and resided with Ramashankar as a member of the family and since 1955-56 was working with Kamtaprasad sharing business of the family. While considering the facts and circumstances of the present case, in my opinion, legally speaking leasehold interest in the open plot of land belonging to

the NIT is basically impartible or indivisible in nature. A partition inter se amongst several co-sharers in respect of the building constructed on the plot does not in any way affect the integrity of the tenancy or leasehold interest of the open plot owned by the NIT, so as to make each holder of an interest in the leasehold as a separate holder or entity of a different tenancy, and notwithstanding such partition amongst the co-sharers or due to sub-lettings created by them, they remain liable collectively qua the lessor (NIT in this case) for the payment of the whole ground rent of the open leasehold plot payable periodically to the NIT. In the same manner, they are liable to face lawful termination of the lease or eviction of the leasees by the NIT as if all the co-sharers in the leasehold plot deemed to have constituted the single Tenancy. As held in **Rukhmani and others Vs. H.N. Thirumalai Chetttiar AIR 1985 Madras 283**, a co-sharer cannot be allowed to put up substantial construction to the prejudice of other co-sharers during the pendency of the suit for Partition filed by co-sharers . This is so because in a leasehold property from the Municipal Corporation actual physical division of the super structure may be possible. The co-sharers would be under obligation to construct in accordance with the sanctioned plans in their respective portions if specified as held by the Delhi High Court in **Ramlal Sachdev Vs. Smt Sneh Sinha reported in AIR 2000 Delhi 92**. Decree in such case therefore can be conditional subject to the permission under the relevant land disposal Rules in the present case by the NIT and the NMC for sanctioning division of the shares in the construction by metes and bounds depending upon who applied for the construction, who spent for it and in what proportion, who paid ground rents as a lessee and sub-lettings recognised in the leasehold property, considering the evidence produced in this regard. It is in the evidence of the Plaintiff Ramashankar that the NIT had refused the application Ex. 188 made by him for division of the leasehold plot Plan for the construction over the plot was sanctioned by the NIT in the year 1966. Kantaprasad original lessee died on 30-10-1981. Partition between the co-sharers was agreed upon on 28-05-1982 and co-sharers decided to effect it on the occasion of the first death anniversary of Kantaprasad. Umashankar Kantaprsasad relinquished his share and hence his name was deleted. There could not be partition of the ascertained shares in the leasehold plot of land as the leasehold interest is indivisible. However NIT as lessor can permit shares as conveniently agreed between the co-sharers for the time being in respect of the Sanctioned construction made on the plot and charge proportionate ground rent payable by each of the co-sharers in respect of the construction made on the suit plot of the land. Evidence of PW-3 Tax Inspector from NMC remained unchallenged on behalf of the second Defendant in respect of the House construction. PW-3 deposed about the two house numbers 486 in the name of B.M.Tiwari and 486 A in the name of the Plaintiff. Name of the Defendant no.2 was deleted as co-possessor of the suit construction 486 A. First defendant deposed about the partition on 30-10-1982 as per Ex 108. First defendant claimed that he had constructed house Ground + 3 floors and for the 4th floor the sanction is pending for further construction on the suit plot on the suit plot. NIT would know from its record as to whom the leasehold plot was allotted under its land disposal Rules and who entered into lease deed; the term of lease; premium or ground rent fixed or payable; land revenue; N.A. assessment; charges taxes due in respect of suit land; specified user permitted for the leasehold land. The building on it whether it was duly sanctioned and who constructed it; who is answerable to deliver possession back to NIT after determination of lease by its termination or forfeiture or whether lessee is unable to use demised land; effect of holding over under Section 116 of the Transfer of Property Act, 1882 are all questions to be considered before passing the final decree as to whether shares declared by the First Appellate Court can attain finality in the facts of the case. NIT as an agency or instrumentality of the State is expected to confer benefit upon individuals by adopting rational; sound; transparent; fair and equitable policy to alienate land to any individual; for lawful consideration “ alienation by mode of lease of the suit plot in this case; to a lessee as agreed between the co-sharers for “ to discharge liability to pay ground rent and taxes payable to the NIT as lessor. NIT can assist the trial Court before passing the final decree as to who had applied for the construction, when it was sanctioned, completed and who shared it with others for the reasons stated above. Approaching NIT is necessary for the parties to the suit interested in the leasehold suit plot of land before they can move the trial court for the final decree which will have to be passed to settle the real controversy finally between the parties to the suit after appreciating the facts and circumstances of the case, I, therefore, think it appropriate that these second appeals can be disposed of by modification or substituting the decree passed by the first appellate Court by a preliminary decree as below:-

ORDER

Impugned Judgment and order is set aside and modified as under -

a) The Plaintiff and defendant no. 1 shall within three months move for the mutation of their names in Municipal records in respect of the construction made on the suit leasehold plot of land as co-sharers in the record of the NIT. NIT as lessor may in accordance with the Rules and lease deed permit the **partition of the construction** made, sanctioned and duly completed upon the leasehold plot of land leased by it and consequently by relaxing the Rules may recognize the partition if any between the co-sharers limited to the construction made on the leasehold land.

b) The co-sharers claiming interest in the leasehold plot of the land must get their liability fixed for premium or lump sum payment of the ground rent in respect of the leasehold plot after the previous arrears if any of the ground rent are paid in lump sum.

c) The trial Court may then approve the proportionate liability of each of the co-sharer to pay/share the premium and/or ground rent in accordance with law. The total area of construction sanctioned by the NIT on the leasehold suit plot as already made and duly completed can be allowed to be partitioned as agreed between the co-sharers in their family arrangement or settlement as informed to the Lessor NIT and subject to approval by the NIT and relaxation of Rules in favour of lessee holding over the leasehold plot of land.

d) There shall be conditional preliminary decree accordingly. Parties to the proceedings shall be at liberty to move the trial Court for to draw up the final decree in accordance with law after the compliance of the preliminary decree as ordered. It is clarified that NIT as lessor can alienate the leasehold plot of land by following procedure in accordance with law. This preliminary decree shall not affect right of the lessor (NIT) to terminate the lease and to recover back possession of the leasehold plot upon payment of market value of the structure to the co-sharers if they fail to agree with shares determined by the Court.

The Second Appeals are allowed and disposed of accordingly.